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May 1, 2014

**VIA MESSENGER**

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**Re: MUR 6792**

Dear Mr. Jordan:

We write as counsel to Sean Eldridge, Sean Eldridge for Congress (the "Committee") and Michael Oates, Treasurer, (collectively, "Respondents") in response to the complaint filed with the Federal Election Commission (the "FEC" or "Commission") by Maria E. Kelso on February 10, 2014 (the "Complaint").

The Complaint fails to state any facts that, if true, would constitute a violation of the Federal Election Campaign Act of 1971 (the "Act"). The Commission may find "reason to believe" only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the Act.<sup>1</sup> Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true, and provide no independent basis for investigation.<sup>2</sup> The Commission should, therefore, find no reason to believe that the Committee violated the Act, and should dismiss the matter immediately.

The Complaint alleges that the Committee incorporated a brief portion of a YouTube video posted by the Hudson Valley Economic Development Corporation ("HVEDC") into its own web video used to promote Sean Eldridge's candidacy. However, the Complaint fails to establish the

<sup>1</sup> 11 C.F.R. § 111.4(d).

<sup>2</sup> See Statement of Reasons of Commissioners Mason, Sandstrom, Smith and Thomas, MUR 4960.

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very fact on which it is premised—namely, that the Committee’s video contains “the very same footage” that is used in the HVEDC video. Many of the things that the Complaint says are identical in the videos are, in fact, not even similar. For example, the Complaint claims that HVEDC President Larry Gottlieb appears against “the same ... black background” in both videos. He does appear in front of a textured black background in HVEDC’s video, but appears in front of a different, smooth, blue background in the Committee’s video.

Further, the Complaint identifies two statements that Mr. Gottlieb is heard saying in each video, but fails to address the material differences in the wording of the statements, or that each video shows different visual footage while the statement is spoken. For example, in the portion of the Committee’s video where Mr. Gottlieb identifies Mr. Eldridge as a supporter of HVEDC, Mr. Gottlieb is seen speaking directly to the camera. HVEDC’s video shows b-roll footage of a manufacturing facility during a spoken voiceover by Mr. Gottlieb.

Even if the facts alleged in the Complaint were proven true, the Complaint fails to allege any activity that would constitute a violation of the Act. The Commission has determined that the use of videos that are freely available on YouTube does not constitute a prohibited contribution in violation of the Act or Commission regulations, even if the videos may have been posted on the YouTube account of a source whose contributions would otherwise be impermissible.<sup>3</sup>

For example, in MUR 6218, the complainant alleged that a federal candidate impermissibly accepted transfers of assets from his nonfederal campaign committee in the form of the nonfederal committee’s photographs and videos.<sup>4</sup> In fact, the federal committee had actually posted screen captures that linked to thirty-two different YouTube videos.<sup>5</sup> Finding that the Committee merely made use of “videos that are freely available on YouTube,” and presented with no information to the contrary, the Commission found no reason to believe the federal committee accepted a prohibited contribution in violation of the Act or Commission regulations, and unanimously voted to close its file on the matter.

Members of the Commission have concluded in similar contexts that treating incidental use of photographs or other materials as an in-kind contribution “makes no intuitive sense” when those materials are “available to the entire world free of charge” on the Internet.<sup>6</sup> The Commission has also consistently concluded that “the value of a downloaded photograph ... may be difficult to ascertain and in any event is probably *de minimis*.”<sup>7</sup> This is especially true where the use of the

<sup>3</sup> See MUR 6218, Factual and Legal Analysis (June 23, 2010).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Statement of Reasons of Commissioners Von Spakovsky and Weintraub, MUR 5743.

<sup>7</sup> Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter and McGahn, MUR 5996.

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freely available material constitutes a small portion of a large communication.<sup>8</sup> In other words, where media is "publicly available" online "at no cost" and appears "for a small portion of the advertisement," the violation, if there is one, is "*de minimis* in value."<sup>9</sup>

Here, the Complaint establishes that HVEDC posted a video on its YouTube page, and then alleges that the Committee used footage from that page—"something any member of the public can do." In other words, the Complaint itself necessarily admits that the video "is available to the entire world, free of charge."<sup>10</sup> Moreover, the portion of the Committee's video the Complaint alleges belongs to HVEDC—i.e., the eleven seconds during which Mr. Gottlieb appears on screen—constitute no more than a *de minimis* portion of the Committee's communication. Thus, even if the Complaint's allegations that the Committee did use footage from HVEDC's video are true, its use did not constitute a violation of the Act or Commission regulations.

The Complaint attempts to present a second theory of alleged wrongdoing that the HVEDC footage featuring Mr. Gottlieb might actually have been "created for the purpose of providing the Committee with video materials" for the Committee's own purposes. However, the Complaint fails to allege a single fact in support of this claim. In fact, the Complaint itself disproves this theory by pointing out that the video "is clearly the property of HVEDC" and "is used to promote a project of HVEDC."

Finally, it should be noted that it is common industry practice for political campaigns and committees to incorporate short snippets of public videos into their own web videos or advertisements. The Commission has repeatedly stated that a political committee's use of a video that is freely available to any member of the public on YouTube does not constitute a prohibited transfer or contribution under the Act or FEC regulations, and should find the same result here.

<sup>8</sup> Statement of Reasons of Commissioners Von Spakovsky and Weintraub, MUR 5743 ("We are reluctant to [find a violation] involving the use of downloaded photographs, from an unrestricted website, that were only a small part of larger mailers ....").

<sup>9</sup> Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter and McGahn, MUR 5996.

<sup>10</sup> Statement of Reasons of Commissioners Von Spakovsky and Weintraub, MUR 5743.

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